United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4099 75-4126

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-4099

AMERICAN CAN COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor.

No. 75-4126

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

AMERICAN CAN COMPANY, Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD AND PETITION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF
THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

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3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

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BRIEF OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

I. STATEMENT OF ISSUES PRESENTED

Whether the National Labor Relations Board erred in finding that the Employer, American Can Company, violated the National Labor Relations Act by agreeing to a Board-conducted election in a unit including lithographers at its Regency plant.

II. STATEMENT OF THE CASE

A. Statement of Proceedings

These consolidated cases are before the court upon petitions by American Can Company (hereinafter called "the Employer") and Local One, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO (hereinafter called "the ALA") to review certain portions of a Decision and Order of the National Labor Relations Board issued on May 30, 1975. The United Steelworkers of America, AFL-CIO (hereinafter called "the Steelworkers") moved to intervene in Case No. 75-4099. The Board has cross-applied for enforcement of its Decision and Order. The Board's Decision and Order is reported at 218 NLRB No. 17 (A. 1a-15a).[1/] This court has jurisdiction over these proceedings pursuant to Section 10(f) of the National Labor Relations Act, as amended.

1/ "A." references are to the printed appendix.

On March 25, 1974, the General Counsel of the National Labor Relations Board issued a Complaint against the Employer, alleging the commission of various unfair labor practices as set forth and defined in Sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. (hereinafter called "the Act"). The Complaint was based upon charges filed with the General Counsel by the ALA. On March 26, 1974, the Regional Director for Region 22 of the Board issued a Notice to Show Cause, requesting the Employer and the Steelworkers to show cause why the certification issued in Case No. 22-RC-5853 should not be amended to exclude all lithographic production employees and why the matter should not be consolidated with the unfair labor practice complaint for hearing.

The Employer and the Steelworkers filed responses opposing amendment of the certification. The Regional Director concluded that there were substantial and material issues concerning the amendment of the certification, and on April 21, 1974, issued an order consolidating Case No. 22-RC-5853 with the unfair labor practice proceedings.

The consolidated matters came to hearing on May 29-31, 1974, before Administrative Law Judge Milton Janus. The Steelworkers participated in the hearing as a party to the contract. The Administrative Law Judge issued his decision on October 23, 1974. The Administrative Law

Judge found that the Employer had not engaged in any unfair labor practices in violation of Sections 8(a)(1), (2), (3) and (5) of the Act as alleged in the Complaint. The Administrative Law Judge recommended that the Complaint be dismissed in its entirety. The Administrative Law Judge further recommended that the certification issued in Case No. 22-RC-5853 not be amended.

The General Counsel and the ALA filed exceptions to the Administrative Law Judge's decision. The Employer filed cross-exceptions and the Steelworkers filed a brief in support of the Judge's decision.

On May 30, 1975, a three-member panel of the Board issued a Decision and Order in which it agreed with the Administrative Law Judge's finding of no 8(a)(5) violation but, contrary to the Administrative Law Judge, found that the Employer violated Sections 8(a)(1), (2) and (3) as alleged in the Complaint and ordered the Employer to take certain affirmative action.

B. Statement of Facts

The Employer has, for a number of years, operated can making plants throughout the United States and Canada, including a plant in Jersey City, New Jersey (hereinafter called "the Hudson" plant). The Hudson plant employees

were represented by five labor organizations; the Steelworkers, which represented production and maintenance employees; the ALA, which represented lithographic production employees; the International Brotherhood of Teamsters, which represented truck drivers; the Operating Engineers, which represented engineers; and the Office and Professional Employees International Union, which represented clerical employees.

The Hudson plant comprised eight buildings and in 1973 employed approximately 1,800 employees. It produced various sizes and styles of metal containers, including coffee containers, shortening containers, beer, carbonated beverages, metal, composite, motor oil, aerosol, drums, film boxes, tobacco and garbage cans (A. 207a).

On August 8, 1972, Larry Marifjeren, Plant Manager of the Hudson plant, issued a notice to all Hudson employees that the Company planned to permanently close nine of its can making facilities, including the Hudson plant.

On December 20, 1972, the Employer issued another general announcement that the Company planned to open a new can making facility in Edison Township, New Jersey (hereinafter called "the Regency" plant), approximately 26 miles from the Hudson plant. The announcement stated that those employees who wanted to be considered for employment at the

new plant should immediately make an application. In December, 1972, a substantial number of employees, including production lithographic employees, signed a petition requesting employment at the Regency plant. Subsequently, the lithographic employees signed a second petition requesting employment at the Regency plant.

On January 19, 1973, the ALA Vice President, Edward Hansen, wrote a letter to the Company in which he stated that a majority of the lithographic employees had expressed a desire to work at the Regency plant and to be represented by the ALA. On January 30, 1973, the Company answered Hansen, informing him of the Company's position that Regency was an entirely new operation and not a transfer of the Hudson plant. Consequently, the ALA's collective bargaining agreement covering the Hudson plant lithographic employees would not be applied at the new Regency plant. On March 7, 1973, over a month after receipt of the Company's letter, Hansen replied, restating the ALA's contention. On March 9, 1973, the Company again reiterated its position in a letter to Hansen.

Between March 9, 1973 and April, 1973, there was no further communication between the ALA and the Company with respect to the Regency plant. On or about April 11, 1973, Hansen met with the Company to negotiate a new contract for Hudson and the two other plants. During the bargaining sessions, the ALA did not request that Hudson ALA members be

transferred to Regency or that the Company negotiate the effects of the Hudson shutdown upon ALA member employees.

After the negotiations were completed, Hansen met with John Bully, Employee Relations Director. During the meeting, Hansen asked Bully whether the Company had changed its position on closing the Hudson plant, employing lithographic employees from Hudson and representation at Regency by the ALA. Hansen was informed that the Company's position had not changed; that Regency was a new plant; and that no union had any rights at Regency at that time (A. 291a-292a).

The Regency plant began operating in the spring of 1973. On August 22, 1973, the Steelworkers filed a petition with the Regional Office of the National Labor Relations Board seeking an election in a unit of "all production and maintenance employees, including lithographers" (G.C. Ex. 12, A. 342a). Since a representative number of the projected employee complement at Regency was then employed, the Company and the Steelworkers, with the approval of the Regional Director, executed a Stipulation for Certification Upon Consent Election agreement. The stipulated unit included "all production and maintenance employees employed by the Employer at its Regency plant located on Pierson Avenue, Edison, New Jersey" and scheduled the election for September 21, 1973.

On September 20, 1973, the day before the election, the ALA delivered a letter to the National Labor Relations Board Regional Office which stated:

> "Just learned of representation election scheduled for September 21, at American Can, Pierson Avenue, Edison, New Jersey. We object to any inclusion of lithographic workers in whom we have an interest and who do not properly belong in plant wide unit." (G.C. Ex. 11-A, ALJD 6, A. 341a)

Board Agent Phyllis Schectman contacted Henry Ries, Supervisor of Employee Relations at Hudson. Schectman inquired as to whether Ries had knowledge of the ALA's interest in the election. Ries suggested that Schectman contact the Company's Greenwich, Connecticut office where the matter was being handled.

On September 20, 1973, Schectman called the ALA's office and left a message for Allen Olmstead, Director of Organizing, to provide the Board with a showing of interest on behalf of the ALA. After receiving Schectman's message, Olmstead did not attempt to contact the Regional Office until September 28, 1973, when unfair labor practice charges were filed (A. 223a). The Board nevertheless conducted the election on September 21, 1973, as scheduled, resulting in a victory for the Steelworkers.

The Steelworkers and the Company have been parties to the master agreement for a number of years. Article 3.1 of the master agreement provides that the agreement will be applied to local operating units for which the Steelworkers "may be certified by the National Labor Relations Board . . . as the exclusive bargaining representative." Article 5.2 of the agreement contains a union security clause which provides, in part, that:

> "[A]ll employees hired on or after the effective date of this agreement shall become members of the union within 30 calendar days following the effective date of this agreement or date of employment, whichever is the later ...."

On October 12, 1973, the Hudson Plant Manager, Larry Marifjeren, interviewed five lithographic employees. During these interview sessions each employee was offered employment at the Regency plant. They were also informed that as a result of the National Labor Relations Board election, they would be required to become members of the Steelworkers. Each employee subsequently notified the Company that they would not accept employment at the Regency plant unless they could do so under the ALA's contract. During this same period, the Company interviewed approximately 211 other employees at the Hudson plant and offered jobs at the Regency plant to approximately 95. As of 1972, the Hudson plant manufactured a variety of containers in various

shapes and sizes. During 1972, the production of some of these containers was moved to other Company locations; carbonated beverage containers went to the Riverside, New Jersey plant; shortening and coffee containers went to the Hillside, New Jersey plant; paint containers went to the Philadelphia, Pennsylvania plant; tobacco containers were moved to the Baltimore plants and Englewood, New Jersey plant; drums went to the Englewood, New Jersey plant; metal motor oil containers went to both the La Moin and Fairport plants; and composite motor oil went to the La Moin plant.

On September 27, 1973, the ALA filed charges with the Board alleging that the Company had violated Sections 8(a)(1), (2) and (5) of the Act. On March 6, 1974, the Regional Director approved the withdrawal of the Section 8(a)(5) charge and new charges were filed by the ALA alleging a violation of Sections 8(a)(3) and (5). On March 25, 1974, the General Counsel issued his complaint alleging violations of Sections 8(a)(1), (2), (3) and (5). On March 26, 1974, the Regional Director, on his own motion, issued a Notice to Show Cause why the certification issued to the Steelworkers in Case No. 22-RC-5853 should not be amended to specifically exclude all lithographic production employees. On April 21, 1974, the Regional Director consolidated Case No. 22-RC-5853 with the unfair labor practice proceedings.

The General Counsel alleged that the Company violated Sections 8(a)(1), (2), (3) and (5) of the Act. The General Counsel contended that the Company, although aware that the ALA was demanding recognition for the lithographic production employees at the Regency plant, and while there was a pending question concerning representation over that unit, nevertheless entered into an agreement with the Steelworkers which provided that the lithographic employees be included in the production and maintenance unit and thereafter applied the union security and check-off provisions to them; that the Company urged and solicited lithographic employees at Hudson to join the Steelworkers and required them to do so as a condition of being transferred to Regency; that the certification of the Steelworkers should be amended to exclude the lithographic employees at Regency because the Company knew at the time the Stipulation for Certification was entered into that the ALA had raised a valid question concerning representation and was under a duty to inform the Regional Director of all such claims of which it was aware; and that the Company refused to bargain with the ALA as the exclusive bargaining representative of the lithographic employees at Regency.

In support of the Section 8(a)(5) theory, the General Counsel contended that the Company was obligated to recognize and bargain with the ALA at Regency because the

transfer of the lithographic operations from Hudson to Regency was a "mere relocation" of such operations. As to the Sections 8(a)(2) and (3) allegations, the General Counsel contended that the ALA's representation of the lithographic unit at Hudson and its claim that all lithographic employees hired at Regency should continue to be represented by it, raised a timely question concerning representation which the Company ignored by entering into the Stipulation for Certification agreement with the Steelworkers and by applying the union security provision in the Steelworkers contract.

The Administrative Law Judge found that the Regency plant was not a "mere relocation" of the Hudson plant and that the Company had no obligation to recognize the ALA as the bargaining representative of the lithographic employees at Regency merely because it had represented such employees at Hudson. The Administrative Law Judge further found that the ALA did not request that the Company bargain with it about the effects of the closing of Hudson until two months after the issuance of the complaint and found the Company had not violated Section 8(a)(5) of the Act.

The Administrative Law Judge also found that when the Steelworkers filed its petition on August 23, 1973 to represent a production and maintenance unit, including lithographers at Regency, no lithographic employees had yet been employed. Nor were there any on September 10, 1973,

when the Regional Director approved the Stipulation for Certification upon Consent Election; on September 21, when the election was held; or on October 1, when the certification was issued. No lithographic employees were employed at Regency before December, 1973.

The Administrative Law Judge further found that while the Company did not tell the Regional Office of the Board that the ALA was asserting a claim that it should be recognized as the representative for all lithographic employees who would eventually be hired at Regency, a Company official did tell the Board agent, when she asked him if he know of any ALA interest in the election at Regency, that she should call the Company's headquarters where the matter was being handled. The ALA further found that the Regional Office had been alerted to a possible representation claim by the ALA at Regency when the ALA filed its opposition to holding the election in its letter of September 20 and in its charge of an 8(a)(2) violation which was filed after the election but before certification of the Steelworkers. While the Administrative Law Judge made no findings of such, he strongly implied that the Regional Office was negligent in its handling of the case (ALJD 22, A. 37a).

The Administrative Law Judge concluded that the ALA was not entitled to assert any bargaining rights at Regency before or after the election and that the Company had not given illegal support to the Steelworkers by entering into a contract following the certification. Nor did the Company violate Section 8(a)(3) by advising the ALA members at Hudson, to whom it offered jobs at Regency, that they would be subject to the union security provision of the Steelworkers' contract if they accepted its offer. The Administrative Law Judge recommended the dismissal of the complaint in its entirety. The Administrative Law Judge further recommended that the Steelworkers' certification should not be amended to exclude lithographic employees (ALJD 23, A. 38a).

On May 20, 1975, a three-member panel of the Board issued its Decision and Order, in which it adopted the Administrative Law Judge's findings as to the 8(a)(5) allegation in the complaint but, unlike the Administrative Law Judge, found that the Company violated Sections 8(a)(1), (2) and (3) of the Act.

ARGUMENT

The Board primarily based its decision on its doctrine first enunciated in Midwest Piping and Supply Co., 63 NLRB 1060. This doctrine arose as an effort by the Board

to prevent employers when faced with demands for recognition from rival unions from taking sides or assisting one union as opposed to the other union and thereby preventing its employees from freely selecting a bargaining representative of their choice. The most common cases under the Midwest Piping doctrine arise where an employer voluntarily recognizes or enters into a collective bargaining agreement with one union, having full knowledge of an interest in the unit by a rival union.

Under the Midwest Piping doctrine, as stated in Novak Logging Company, 119 NLRB 1573, 1574:

> "[A]n employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of these unions until its right to be recognized has finally been determined under the special procedures provided by the Act."

While the Board has, over the years, adhered to the Midwest Piping doctrine, it has been modified and, in some instances, expanded in subsequent decisions. In Playskool, Inc., a Division of Milton Bradley Company, 195 NLRB 560, the Board held that:

> "The sole requirement necessary to raise a question concerning representation within the meaning of the Midwest Piping doctrine, as modified by the Board, is that the claim of the rival union must be clearly unsupportable and lacking in substance."

The facts in the instant case are clearly distinguishable from those in Midwest Piping, Playskool and most other reported Board decisions. The facts involved in the instant case deal with an effort by the National Labor Relations Board to cover up the administrative bungling of a simple case by one of its Regional Offices. The Board has carried out its efforts by basing its decision upon facts not supported in the record and by deliberately distorting a reasonable Board doctrine for its own convenience.

The Board, in its Decision and Order, agreed with the Administrative Law Judge's finding that the Company did not violate Section 8(a)(5) of the Act by refusing to recognize and bargain collectively with the ALA as exclusive bargaining representative of the lithographic production employees at the Regency plant.

The Board disagreed with the Administrative Law Judge's finding that the Company did not violate Section 8(a)(2) of the Act by entering into a collective bargaining contract with the Steelworkers which provided that lithographic production employees at the Regency plant be included in the production and maintenance unit represented by the Steelworkers. While finding that the Company has no obligation to recognize the ALA at the Regency plant, the Board found, as did the Administrative Law Judge, that on August 23, 1973, the Steelworkers filed a petition seeking

to represent all production and maintenance employees, including lithographic production employees, and that the Company and the Steelworkers entered into a Stipulation for Certification Upon Consent Election agreement which described the unit as "all hourly rate production and maintenance employees employed by the Employer at its Regency Plant . . . ." The Board found that the phrase "including lithographers" was "omitted from the unit description in the stipulated unit at the suggestion of a Board representative on the assurance of Respondent that no lithographic employees were then employed at the new plant."

Nowhere in the record is there any indication as to why the phrase "including lithographers" was dropped from the unit description. During the hearing, Counsel for the General Counsel implied during his opening statement that such was the reason for the omission of the phrase. However, the General Counsel offered no evidence to show why the particular phrase was stricken from the unit description, although there was ample opportunity for him to do so.

While the Board's reliance on the striking of the phrase "including lithographers" is not absolutely determinative in deciding the case, it is important to show how the Board has treated the facts in this case to suit its own convenience.

The Board further found that on September 20, 1973, "a Board agent telephoned a Company representative and asked if he knew of any interest which the ALA had in the election. The representative answered in the negative." Again, the Board has contorted the facts in the record. It is undisputed that on September 20, 1973, the Director of Organizing for the ALA, Allen Olmstead, delivered a letter to the Regional Office, in which the ALA claimed an interest in the unit petitioned for by the Steelworkers. It is also undisputed that on the same day Board Agent Phyllis Schectman contacted Henry Ries, Supervisor of Employee Relations at the Hudson plant. The only evidence in the record with regard to the conversation between Schectman and Ries is as follows (A. 273a-274a):

> "BY MR. ARCHER:
>
> Q Mr. Ries, do you recall receiving a phone conversation from Mrs. Phyllis Schectman the day before the election?
>
> A Yes.
>
> Q What did she say to you, what did you say to her?
>
> A She told me that she had just received a letter from the ALA, and she asked me if I personally knew of any interest on behalf of the ALA in the election, and I said, 'No.'

Q What did she say?

A And I said that any of these transactions were handled by our Greenwich people, and I suggested she call Greenwich.

She said, 'Thank you very much,' and that was it.

Q Do you know whether she did call Greenwich?

A I don't know."

The Board, in its decision, places heavy emphasis on the conversation between Schectman and Ries, but conveniently failed to consider the fact that Ries referred Board Agent Schectman to the Company's Greenwich, Connecticut office where the matter was being handled. Throughout the period from the date of the filing of the Steelworkers' petition until the date of the election, the Board Agent who was handling the representation case had been dealing with Lester Cooper, the Company's attorney in Greenwich, who was handling the matter for the Company. However, on the day prior to the election the Board agent would bypass the Company attorney with whom she had been dealing to request information from a supervisor of employee relations at the Hudson plant, and no evidence was introduced by the General Counsel to show that any effort was made by the Board agent to contact the Company attorney. As a result of its own negligence, the Board found that the Company had deliberately withheld information from the Regional Office.

Obviously, as the Administrative Law Judge found, Board Agent Schectman was apparently satisfied that the ALA had no supportable claim. The only other conclusion that can be drawn is that the Board agent was deliberately laxed in failing to pursue the matter any further by contacting the appropriate people at the Company's headquarters, for no evidence was submitted by the General Counsel to show that Board Agent Schectman made any further effort to ascertain whether the ALA did in fact have any interest in the unit.

Marching on, the Board found that the Administrative Law Judge erred in finding that the ALA did not have a colorable claim to represent the Regency lithographic employees inasmuch as the Company had no obligation to transfer the ALA's bargaining rights or recognize the ALA at Regency. The Board, in a model of clarity, restated its Midwest Piping doctrine and held that although the Company was not required to bargain with the ALA for the Regency plant lithographic employees, such did not mean that the ALA's claim did not raise a real question concerning representation. On the contrary, the Board found that on the basis of the ALA's long history of bargaining for lithographic employees at the Hudson plant, the transfer of part of the operation at Hudson to the Regency plant; the transfer of some lithographic equipment from Hudson to the Regency

plant, and the expected offer of employment at the Regency plant, together with the ALA's claim to represent lithographers at the Regency plant, create a real, substantial question concerning representation.

The Board concluded that the Company, instead of submitting to the Board the question of which union was entitled to represent the lithographic employees, tried to resolve the question itself with the cooperation of the Steelworkers by utilizing the Board's processes, while withholding vital information from the Regional Office. The Board further concluded that if the Company has reported the ALA's claim and interest, no election would have been held and no certification issued until the unit placement of lithographers had been resolved. The irony of the Board's conclusion is that the Board continues to disregard the haphazard fashion in which the ALA's letter of September 20 was handled. Even after receipt of this letter and the failure of the ALA to come forward with evidence of a showing of interest, the Regional Director marched forward in holding the election of September 21. More ironically, however, is the fact that on September 27, 1973, the Lithographers filed Section 8(a)(2) charges against the Company, in which it alleged that the Company had unlawfully assisted the Steelworkers. Yet, on October 1, 1973, the Regional Director, in the face of a Section 8(a)(2) charge,

certified the Steelworkers as the bargaining representative of all of the Company's production and maintenance employees at the Regency plant.

The Board's conjecture as to what might have occurred flies in the face of the implication by the Administrative Law Judge that the Regional Office was negligent in its handling of the matter.

Aside from the obvious chicanery of the Board in reaching its decision, the facts in the instant case warrant this court setting aside the Board's decision. As indicated herein, the facts in the instant case are unlike those in any reported Board decision. However, the implication of the Board's decision goes far beyond the scope of this case.

In most previous Board decisions involving the Midwest Piping doctrine, the employer's Section 8(a)(2) violations involved a voluntary recognition of one union where a rival union had asserted in some fashion a valid claim to the unit. Hudson Berlind Corp., 203 NLRB 421; Teramana Brothers, 173 NLRB 581; National Chemical & Manufacturing Co., 94 NLRB 1190. The Board has suggested that an employer could protect itself from unfair labor practice charges by demanding an election in those situations in which two or more unions are seeking to represent its employees. Modine Manufacturing Company, 186 NLRB 629.

The facts in this case are unlike those in Hudson Berlind Corp., supra, relied upon by the Board. In that case, the employer consolidated two warehouse operations. The two warehouse employees were represented by different unions. One of the unions represented 10 employees and the other union represented 31 employees. After the consolidation at a completely new location, the employer recognized the union representing the larger number of employees and negotiated a new agreement. Upon charges filed by the union, the Board found that the employer violated Sections 8(a)(2) and (3) by recognizing one union and entering into an agreement containing a union security provision.

In the instant case, the Company announced that it intended to close its Hudson plant and subsequently announced that it would open a new facility at Regency. Here, unlike in Hudson Berlind, both the ALA and the Steelworkers requested recognition at the new plant for their respective units. The Company refused to recognize either union, contending that Regency was a new plant and not a relocation of the Hudson plant. The Board agreed with the Administrative Law Judge's finding that the Company had no legal obligation to recognize the ALA at the Regency plant.

The Company followed the suggestion of the Board in protecting itself from a Section 8(a)(2) charge by refusing to recognize either union at the Regency plant.

Instead of engaging in a continued demand for voluntary recognition at Regency, the Steelworkers organized the Regency plant and filed its petition with the Board seeking a Board-conducted election. While the Steelworkers may have been motivated by a determination to steal the jump on the ALA in organizing the Regency plant, it is well established that a union may legally secure representative rights through "a successful coup rather than an open contest between two unions." NLRB v. Air Master Corp., 339 F.2d 553 (C.A. 3, 19); Retail Clerks Union, Local 770 v. NLRB, 370 F.2d 205.

The Board also totally ignored the action or, more properly, the inaction of the ALA. The Regional Office of the Board had actual knowledge that the Steelworkers were seeking to represent lithographic employees on the day the petition was filed. It is undisputed that the ALA had knowledge of the Steelworkers' goal as early as September 19, 1973, two days prior to the election. It is also undisputed that the Regional Office had knowledge of the ALA's alleged "interest" in the election the day before the election was held. The Board allows a second union to intervene in a pending representation case upon a sufficient showing of interest. United Boat Service Corp., 55 NLRB 671. As indicated herein, on September 20, 1973, the ALA notified the Regional Office of the Board that it had an interest in

the unit at Regency. The Board agent requested a showing of interest from the ALA. The record clearly shows that Olmstead, the ALA organizer, received a message from the Board prior to the election, requesting that the ALA provide the Board with its showing of interest. However, no effort was made by the ALA to comply with the Board's request. It is well established, under Board decisions, that the ALA had a burden of providing to the Board its showing of interest in order to intervene in the representation case. Beneke Corporation, 109 NLRB 1191.

The ALA filed unfair labor practice charges against the Company a week after the election, but before the certification. Nevertheless, the Regional Director issued a certification to the Steelworkers which, in effect, told the Company to bargain with the Steelworkers. The Board, by its actions, now tells the Company that it was required to bargain with the Steelworkers concerning everyone but lithographers and that it was an unfair labor practice for it to do so.

Other than through the reachings of the Board in its "withholding of information" theory, the Company, when faced with the Steelworker petition, did not commit an unfair labor practice when it entered into the Stipulation for Certification election with the Steelworkers. Clearly, as the Administrative Law Judge found, the ALA had no supportable

claim which would raise a question concerning representation. If an employer does not commit an unfair labor practice by extending recognition to a competing union where the rival union's claim is "clearly unsupportable or specious, or otherwise not a colorable claim," the entering into an agreement with one of the competing unions to the holding of a Board-conducted election is clearly not unlawful. The Boy's Markets, Inc., 156 NLRB 105.

In Boy's Markets, Inc., supra, the Retail Clerks had a contract with members of the Food Employers' Council on behalf of various member stores covering clerks engaged in "retail food, bakery, candy and general merchandise" operations. At the time of the execution of the contract, none of the member stores had snackbar employees. Sometime in 1962, snackbars were opened in some area stores and the Retail Clerks requested the Council to include in the forthcoming negotiations wage classifications for the unrepresented employees and the Council agreed. On February 1, 1964, while the Council and the Clerks were engaged in the negotiation of wage rates on a multi-employer basis, another union called the Joint Board entered into contracts with Boy's Markets and Von's Grocery, both members of the Council, for all snackbar workers in the area. These contracts were entered into after the Joint Board had organized the snackbar employees on a multi-store basis and recognition was on the

basis of a card check by the two stores. Prior to the recognition by Boy's, the Retail Clerks had obtained authorization cards from snackbar employees at one of the Boy's stores and had asserted a recognition demand on the basis of the cards and its contract. Boy's refused recognition, contending that all four of its stores should first be recognized. Earlier, the Retail Clerks had also made a demand for recognition to Von's Grocery on the basis of its contract. Von's had also rejected that demand.

The Retail Clerks filed unfair labor practice charges against both Boy's and Von's. The Trial Examiner found that Boy's and Von's violated Section 8(a)(2) by entering into a contract with the Joint Board covering snackbar employees at a time when real questions concerning representation were pending, arising from the Clerks' request to represent such employees. The Board reversed the Trial Examiner's finding, stating that an employer does not violate the Act by extending recognition to one of the competing unions where the rival union's claim is clearly unsupportable or specious or otherwise not a colorable claim. The Board held that the Retail Clerks' claim to represent the snackbar employees did not give rise to a question of representation because the "claim was clearly unsupportable and not cognizable as a colorable claim."

The Board's decision in Boy's Markets gives rise to the question of what is a "colorable claim." The Retail Clerks, in Boy's Markets, presented to the employer five authorization cards of a total work force of 21 employees and requested recognition. The Board concluded that such did not raise a question concerning representation. The Court of Appeals for the Ninth Circuit denied review of the Board's Decision and Order. Retail Clerks Union, Local 770 v. NLRB, 370 F.2d 205.

It is impossible to reconcile the Board's decision in Boy's Markets and its decision in the instant case. Here, the Employer did not voluntarily recognize or enter into a contract with one of two competing unions, but merely agreed to the Board-conducted election. Yet, the Board would find that a question concerning representation existed on the basis of a "long history of bargaining" at another plant, and a transfer of some equipment to Regency, coupled with a claim of representation by the ALA.

While the Board's Midwest Piping doctrine has been approved by some circuit courts, the doctrine is not unlimited and absolute. Even the Board has stated that the doctrine, "necessary though it is to protect freedom of choice in certain situations, can easily operate in derogation of the practice of continuous collective bargaining, and should, therefore, be strictly construed and sparingly applied."

Ensher, Alexander & Barsoon, Inc., 74 NLRB 1443, 1445. While some discretion must be given the Board in the exercise of its duties, each case must be determined on the facts in that case. Iowa Beef Packers v. NLRB, 331 F.2d 176. Consequently, the Board and the reviewing courts have disagreed upon the application and extension of the doctrine. Almost every United States court of appeals has been called upon to enforce a decision of the Board under its Midwest Piping doctrine. The courts have uniformly disagreed with the Board as to what constitutes the existence of a question concerning representation.

In NLRB v. North Electric Company, 296 F.2d 137 (9th Cir. 1961), the Ninth Circuit refused to enforce a Board order which found that the employer entered into an agreement with an incumbent union after a hearing on a rival union's petition for an election. The court held that the filing of a petition and a hearing thereon did not in themsleves constitute a reasonable basis for an employer to believe that a question of representation existed. See also the Ninth Circuit's decision in NLRB v. Peter Paul, Inc., 467 F.2d 700 (1972).

In Playskool, Inc. v. NLRB, 477 F.2d 66 (7th Cir. 1973), the Seventh Circuit refused to enforce a Board order which held that an employer committed an unfair labor practice in recognizing one of two rival unions after a card

check by an independent state agency. The court held that it is not an unfair labor practice for an employer to recognize one of two competing unions where the recognized union has made a valid demonstration of majority support among unrepresented employees. See also the Seventh Circuit's decision in NLRB v. Indianapolis Newspapers, Inc., 210 F.2d 501.

Other circuit courts have refused to find that an employer violated Section 8(a)(2) where the employer has recognized one of two unions competing for recognition on the basis of a clear demonstration of majority support. Modine Manufacturing Co. v. NLRB, 453 F.2d 292 (8th Cir. 1971); American Bread Co. v. NLRB, 411 F.2d 147 (6th Cir. 1969); NLRB v. Air Master Corporation, 339 F.2d 553 (3rd Cir. 1964); Suburban Transit Corp. v. NLRB, 499 F.2d 78 (3rd Cir. 1974).

CONCLUSION

For the reasons stated hereinabove, the Decision and Order of the National Labor Relations Board should not be enforced insofar as it finds that the Employer violated Sections 8(a)(1), (2) and (3) of the Act and ordering the

Employer to withhold recognition of the United Steelworkers of America, AFL-CIO for its lithographic production employees at the Regency plant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of the United Steelworkers of America, AFL-CIO have been served, via certified mail, return receipt requested, to the parties named below.

Dated this 3rd day of February, 1976.

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